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In the Supreme Court of the United States

OCTOBER TERM, 1943

C. M. HABLINSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals (R. 255–256) is reported at 139 F. (2d) 1014.

JURISDICTION

The judgment of the circuit court of appeals was entered January 7, 1944 (R. 256), and a petition for rehearing (R. 257–260) was denied February 7, 1944 (R. 261). The petition for a writ of certiorari was filed February 28, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules

XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the evidence adduced at the trial under an indictment charging violations of the mail fraud statute and the Securities Act of 1933 is sufficient to sustain the conviction of petitioner.

STATUTES INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

Section 17 of the Securities Act of 1933, 48 Stat. 74 (15 U. S. C. 77q), provides in part:

> (a) It shall be unlawful for any person in the sale of any securities by use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or

> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, * * *.

Section 24 of the Securities Act of 1933, 48 Stat. 74 (15 U. S. C. 77x), provides in part:

> Any person who willfully violates any of the provisions of this title, * * * shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to the conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

On May 4, 1942, petitioner and two others were indicted in eleven counts in the District Court of the United States for the Western District of Texas (R. 2–33). The first count alleged that the defendants devised a scheme, continuing from March 13, 1933, to January 1, 1942, to defraud

certain named persons and others unknown to the grand jury by inducing them, by means of false pretenses, representations, and promises, to purchase shares of the stock of Teachers Annuity Life Insurance Company (hereinafter referred to as Teachers), with intent to defraud these investors. This count, and the second, third, and fourth counts (which incorporated by reference the allegations of the first count as to the scheme to defraud), each charged that the defendants employed this scheme in separate sale of Teachers' stock by use of the mails, in violation of Section 17 (a) (1) of the Securities Act of 1933 (15 U. S. C. 77q (a) (1)) (R. 2–13). The fifth, sixth, and seventh counts each charged a separate use of the mails for the purpose of executing the scheme to defraud alleged in the first count, in violation of the mail fraud statute (Sec. 215 of the Criminal Code, 18 U. S. C. 338) (R. 13–20). The eighth, ninth, and tenth counts each alleged that, in a sale of Teachers' stock to a named person by use of the mails, the defendants obtained money by means of specified untrue statements of material facts, in violation of Section 17 (a) (2) of the Securities Act (15 U. S. C. 77q (a) (2)) (R. 20–31). The eleventh count charged a continuing conspiracy from 1933 to the date of the filing of the indictment to violate Sections 17 (a) (1) and (2) of the Securities Act and the mail fraud statute, including the violations alleged in counts 1 to 10 (R. 31–33).

The defendants, having waived trial by jury, were tried before the court (R. 33), which found them guilty on all counts (R. 33–39). Petitioner was sentenced generally to imprisonment for twelve months and to pay a fine of $5,000 (R. 39–40).[1] Upon appeal, the Circuit Court of Appeals for the Fifth Circuit affirmed the conviction (R. 255–256).

The evidence relating to the fraudulent scheme and representations may be summarized as follows:

The offenses charged in the indictment are founded on petitioner's efforts to promote an insurance company in Texas. Petitioner's activities began in 1933 when he organized the Educators Life Company, Underwriters, a trust (R. 209). In its inception petitioner, his aged mother-in-law, and one Sluder, a young man who contributed the sole assets of the trust estate,[2] were trustees (R. 126–127, 209).

In 1936 petitioner arranged on behalf of the trust estate to purchase a certain business property in San Antonio, Texas. The purchase price

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[1] Petitioner's codefendants were sentenced to imprisonment for twelve months, but execution was suspended and they were placed on probation for three years (R. 40–41).

[2] Sluder was executor of the estate of his deceased father, and the encumbered realty which he contributed to the trust estate was property belonging to the estate of his father (R. 127). Sluder later withdrew from the trust without ever receiving anything from it (R. 127–128).

was $123,000. Petitioner made no down payment on the purchase price, but instead arranged to pay it in annual installments of $12,300, the first payment to be made 18 months after the sale. (R. 121–122, 210.)[3] A deed was executed conveying the property to petitioner and his mother-in-law, as trustees (R. 122), the vendor retaining a vendor's lien as security (R. 121–122).

At this stage petitioner secured an appraisal of the property showing its value to be $275,000[4] (R. 211). Petitioner and his codefendants each contributed $100 and with the property as their sole other asset, petitioner obtained a charter from the State of Texas for the Teachers Annuity Life Insurance Company (R. 115, 237). In an affidavit submitted in support of the application for the charter, petitioner swore that Teachers had a paid up capitalization of $100,000 and a surplus of $52,000 (R. 237).[5]

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[3] During the next five years "a few of the interest payments" were made (R. 126) and a total of $1,000 was paid on the principal (R. 125).

[4] An expert witness for the Government testified that he appraised the property in 1940 and that his appraisal showed that it had a value of $106,200 "for what we call its highest and best use. * * * the cash market price value would be forty or fifty percent of $106,200" (R. 247). Different experts testifying for the defense valued the property at from $275,000 to $323,750 (R. 145, 178, 180, 183, 203, 207).

[5] These figures were apparently arrived at as follows: The building was recorded as a $275,000 asset. The purchase price was reflected as a liability of $123,000, and the remaining $152,000 was allocated between capital and surplus.

Petitioner and his mother-in-law, as trustees of the trust estate, then conveyed its equity in the property to Teachers (R. 237); the vendor also executed a deed to Teachers and Teachers assumed the indebtedness (R. 122). In May 1936 petitioner transferred 9,970 shares of Teachers' stock, having a par value of $10 per share, to himself and his mother-in-law as trustees, and ten shares to himself for his $100 investment (R. 237, 238). Shortly thereafter he transferred 4,900 of the trust's shares to himself individually, stating in his income tax return for 1937 that his individual stock was obtained at no cost and "was acquired in promotion" (R. 238). Petitioner was president and managing director of Teachers (R. 111, 117, 118).

The gist of the scheme alleged in the indictment relates to petitioner's efforts to sell his 4,900 shares of stock for his own benefit. Petitioner and his aides, including the two codefendants, devoted their efforts to selling his stock exclusively to physicians practicing in Texas. The selling plan operated as follows:

Petitioner first wrote to a doctor-prospect on Teachers' letterhead and as president of Teachers, advising the doctor that Teachers' chief medical director had recommended him for appointment as "Chief Medical Examiner for your District," that Teachers' "Participating Foundation Policy" was going to be offered to a "preferred

class" recommended by "our examining physician," that the doctor would be "remunerated for each and every contract sold in your District", and that "my personal authorized Representative" would call upon him to discuss the details of the appointment (R. 50, 68, 102–104, 240). A few days later petitioner or one of his salesmen would then call on the doctor at his office, introducing himself as a representative of Teachers (R. 50, 68, 78, 102). It was represented to the doctors that if they accepted appointment as the local medical examiner, they would receive a fee for each applicant for insurance in their district (R. 70, 81, 88, 92, 101). One doctor was also told that he would be empowered to appoint other doctors to assist in the examinations and that he would receive a percentage of the fees earned by his appointees (R. 69).

With the stage thus set, the salesmen then advised the doctors that "they expected all [doctors] associated with the company to own some of the stock * * * that the doctor in the district should have about five shares of stock" (R. 50, 62, 69, 83, 102). The stock was offered at $30 per share.[6] The salesmen represented to the doctors that Teachers was young and needed cap-

[6] The par value of the stock was $10 (*supra*, p. 7). At the commencement of the stock selling operations Teachers had no cash on hand or in the bank (R. 140) and its sole asset appears to have been its equity in the building, the purchase price of which was unpaid (*supra*, pp. 5–7).

ital and that if they bought its stock they were furnishing capital for Teachers (R. 59, 86, 88, 89, 105); that Teachers had a $100,000 paid-up capitalization and a surplus of $52,000 (R. 79, 87, 88); that the stock being offered for sale was unissued company stock (R. 86, 90, 105); that Teachers was writing a large number of insurance policies, and that it would be worth while to own Teachers' stock (R. 51, 59, 87, 106); that a crew of insurance salesmen was going to canvass the doctor's district and that he would receive fees on all policies sold in the district (R. 93). The salesmen did not advise the doctors that Teachers' sole assets consisted of its equity in the building, the purchase price of which was unpaid, and $300 in cash (R. 82, 91), or that the stock being offered was petitioner's (R. 56, 86, 90, 105, 108).

Considerable stock was sold at $30 per share (R. 200, 230, 242). Petitioner admitted sales totalling more than $16,000 (R. 230, 242). The usual procedure was to accept a small down payment on the purchase price and a promissory note for the balance, the doctors being advised that they would be able to pay the notes from their earnings as medical directors for Teachers (R. 51, 60, 66). However, the notes were immediately discounted at substantial discounts with banks in the doctors' localities (R. 65, 71, 83, 87, 106) and the proceeds of the sales, except for the salesmen's commissions, went to peti-

tioner (R. 187, 198).[7] None of the proceeds of the sales was received by Teachers (R. 114).

Two doctors testified that they examined certain applicants for Teachers (R. 83, 97); all testified that they did not receive any payment from Teachers either on account of services rendered, policies sold in their districts, or dividends on their stock (R. 63, 79, 83, 98). In October 1941, petitioner transferred his interest in Teachers (R. 137, 232–233) and in 1942 receivership proceedings were instituted and a receiver assumed control of the company (R. 136).

ARGUMENT

The substance of petitioner's contentions here (Pet. 15–26) is that the evidence before the trial court was insufficient to support the court's findings that he engaged in a scheme to defraud and that he obtained money by means of fraud and misrepresentation in the sale of stock. There is no merit in this contention.

The evidence, summarized in the Statement (*supra*, pp. 5–10), shows that petitioner devised and employed a scheme to sell his personally

[7] No effort was made to sell unissued company stock (R. 170). In a civil action in a Texas court in which petitioner secured an injunction restraining state officials from interfering with his stock-selling activities, the court found as a fact that petitioner was engaged in selling his own personal stock, that the proceeds of the sales "were not intended, either directly or indirectly, for the benefit of any company or corporation" (R. 220–223).

owned stock of questionable value for a price far beyond any conceivable value it might have had, that he did sell a considerable amount of his stock, that he received the proceeds of these sales, and that the sales were effectuated by means of multiple fradulent misrepresentations.

When Teachers was organized, its sole assets consisted of $300 in cash and an equity of questionable value in a building, the entire purchase price of which was unpaid. On the basis of these assets petitioner represented to the state officials that Teachers had assets of $275,000 (see R. 34) and obtained a charter for the corporation. In return for his contribution of $100 and his promotional activities, petitioner took unto himself stock having a par value of $49,000 and transferred a like amount to his trust estate, whose sole contribution to Teachers was its conveyance of its equity in the unpaid for building. If the purchase price of the building ($123,000) represented its true value, Teachers stock was worthless, for the price was unpaid and represented a liability equal to the corporation's assets. On the other hand, if, as petitioner represented, the building was worth $275,000, the equity in the property amounted to $152,000. Assuming this to be true, Teachers' 10,000 shares of outstanding stock had an intrinsic value of approximately $15 per share. Yet petitioner undertook a campaign, in the name of Teachers, to sell his individually owned stock to doctors in Texas for $30 per share.

Petitioner's scheme was a simple one. As president of Teachers, he wrote to various Texas doctors, using Teacher's letterheads, offering appointments as local medical representatives for Teachers and advising them that his personal representative would contact them. This was followed up by a personal contact in which it was represented to the doctors that Teachers was financially sound and that by accepting appointments, they would be in a position to earn considerable money as Teachers' medical representatives. Before the appointment was made, however, each doctor was required to purchase stock purportedly from Teachers to supply it with additional capital. In anticipation of prospective fees, many doctors purchased the stock. However, contrary to these representations and their belief induced thereby, they neither bought stock from Teachers nor contributed to its capital. Instead, they were sold petitioner's personally held stock, and petitioner personally acquired the proceeds of the sales. (See *supra,* pp. 7–10).

In these circumstances, we submit that the trial judge, sitting as the trier of the facts, properly concluded that petitioner was not, as he argues (see Pet. 20–26), engaged in a *bona fide,* albeit a visionary and impractical, effort to develop a new business, but that he deliberately devised and employed a scheme to sell stock for his personal gain by means of fraudulent repre-

sentations. It was, of course, for the trial judge to draw the inferences from the evidence. The court below having sustained the trial judge's conclusions, there is no occasion for further review by this Court. *United States* v. *Johnson*, 319 U. S. 503, 518; *Delaney* v. *United States*, 263 U. S. 586, 589–590.[8]

CONCLUSION

The petition for a writ of certiorari presents no question of importance and no conflict of decisions is involved. We therefore respectfully submit that it should be denied.

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MARCH 1944.

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[8] As we have shown (*supra*, pp. 10–12), the fraudulent scheme was clearly spelled out by the evidence, which supported the allegations of the indictment (R. 2–7). There is therefore no merit in petitioner's contention (Pet. 27–31) that there was no clear or consistent theory as to the identity of the fraudulent scheme.

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